an operation in five years' time when the pain in the joint of the left thumb would become intolerable. In his evidence, Dr Chang said that the operation at present cost $3,000. From the evidence, it was not clear whether the figure he gave included hospitalization charges. The assistant registrar awarded a sum of $6,000 to cover cost of operation and antecedent pain. Even taking into account inflation and rising costs and the antecedent pain, I felt that doubling the estimate given by Dr Chang did appear excessive. The defendant submitted that the court should only award $3,000. I felt that a sum of $4,000 should be fair and adequate as payment would be made in advance. I reduced it accordingly.

Costs

On costs, as the defendant had succeeded only on the relatively small items and failed on the main items, I thought it was only just that he should pay half the costs of the appeal before me.

Order accordingly.

Solicitors: *Tang & Partners*; *Goh Poh & Partners*.

Reported by *Terence Tan Bian Chye*

MALAYSIAN REPORTS

Syarikat Kenderaan Melayu Kelantan Sdn Bhd v Transport Workers Union

HIGH COURT (KOTA BHARU) — ORIGINATING MOTION NO 32-13-88
IDRIS YUSOFF J
22 OCTOBER 1988

Administrative Law — Certiorari — Application for order of certiorari to quash award made by Industrial Court — Dispute over dismissal, transfer and demotion of applicant's employees — Applicant's transport company essential service within item 11 of schedule to Industrial Relations Act 1967 — Ouster clause — Whether court of review should interfere with decision of Industrial Court — Whether Industrial Court had acted without or in excess of jurisdiction — Whether Industrial Court's decision a nullity — Industrial Relations Act 1967, ss 33B(1) & 36(2)

Labour Law — Dispute over dismissal, transfer and demotion of applicant's employees — Applicant's transport service essential service within item 11 of schedule to Industrial Relations Act 1967 — Refusal to perform normal duties — Whether constitutes strike — Whether refusal to work reasonable — Dismissals — Whether without just cause — Whether transfer of employees on ground of misconduct justified — Withdrawal of allowance — Whether depreciation of employee's benefit — Whether management's prerogative to withdraw allowance — Industrial Relations Act 1967, ss 13(3)(b), 43, 45(1) & (2) — Trade Unions Act 1959, s 40

Words and Phrases — 'Strike' — Industrial Relations Act 1967, s 2 — 'Misconduct'

This is an application by the applicant for an order of certiorari to quash an award made by the Industrial Court pursuant to a reference made under s 36(2) of the Industrial Relations Act 1967. The reference arose out of a dispute between the applicant and the respondent over the dismissal, transfer and demotion of some of the employees of the applicant. The applicant is the only transport company in Kelantan and is thus classified as an essential service under item 11 of the schedule to the Industrial Relations Act 1967.

The applicant had suspended an express bus driver pending an investigation under s 14(2) of the Employment Act 1955 for an alleged misconduct. The bus driver was the respondent's section vice-chairman. Consequently, 17 drivers are alleged to have individually and collectively refused to drive buses and perform their normal duties. Buses were delayed and some services cancelled. The drivers were suspended, and following domestic inquiries as to their misconduct, all the drivers were found guilty and dismissed.

The applicant argued that the court could review the decision of the Industrial Court on the grounds that a) a jurisdictional error is committed if the decision-maker acts upon an incorrect basis in fact; and b) a jurisdictional error is committed if its decision was clearly perverse and was so devoid of plausible justification that no reasonable body of persons could have reached it.

The respondent argued that unless there are jurisdictional errors in the award, the ouster clause in s 33B of the Industrial Relations Act 1967 precludes the High Court from reviewing the

award. The term 'review' is limited to the superior court re-examining the inferior tribunal's conclusions of law as to the legal consequences of the facts as found by the inferior tribunal.

The applicant argued that the Industrial Court had erred in law and in fact and acted without jurisdiction;

(a) in failing to hold that the drivers' refusal to perform normal duties constituted an illegal strike under s 45(1) of the Act.
(b) in holding that the drivers' refusal to perform their duties because of insufficiency of equipment was a reasonable refusal under the circumstances;
(c) in concluding that the dismissals were without just cause or excuse in that the said conclusion is completely perverse and so unreasonable that no reasonable body of persons could have reached them;
(d) in misconstruing the charge against one of the claimants and in finding that the claimant's dismissal amounted to 'victimization'; and
(e) in interfering with management prerogatives and ordering the applicant to pay arrears of allowances.

Held, dismissing the application for certiorari:

(1) Inspite of the ouster clause in s 33B(1) of the Act, certiorari is still available to quash the decision of the Industrial Court after it is found that the Industrial Court has acted without or in excess of the limit of its jurisdiction; or if the court has jurisdiction to enter an inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity.

(2) The decision may be a nullity by reason of a breach or failure to observe the requirements of natural justice.

(3) To ascertain whether or not the Industrial Court had or had not exceeded its jurisdiction, it must be asked whether the court, in making its award, has taken into account matters which it was required to do so, and/or had based its award on some matters which under the Act it had no right to take into account.

(4) On the first ground relied on by the applicant, the court was of the view that the alleged concerted refusal by the drivers to drive the buses was, in the circumstances, a mode of bringing to the attention of the applicant that certain provisions of the law affecting those buses have not been complied with. It was a refusal to obey an order that was unlawful and cannot be said to be a breach of their contract of employment, since compliance with the order would be an unlawful act and contrary to public policy. The acts and conducts of the drivers would not in law amount to an illegal strike.

(5) The act of disobedience of the drivers can only justify dismissal if it is of a nature which goes to show that the claimants are repudiating their contracts of service or one of its essential conditions; such disobedience must have the characteristics of being wilful. The element of deliberate flouting of the essential contractual conditions is lacking in this case. The Industrial Court was therefore not in error in its conclusion.

(6) The transfer of a personnel or an employee who is under investigation is not a punishment if done to facilitate investigations. However, in this case, the driver was transferred because he was 'implicated' in the events of 28 and 29 August 1986, and not for the purpose of facilitating the investigations. Even if the court was wrong on this point, this did not make any difference to the court's finding, since the dispute relates to dismissal, which was held to be without just cause or excuse. The award was in regard to reinstatement and not on the transfer.

(7) 'Misconduct' refers to conduct so seriously in breach of the accepted practice that, by standards of fairness and justice, the employer should not be bound to continue the employment. The finding of the Industrial Court in relation to the transfer of one of the drivers for alleged misconduct was correct in law and in fact, as the allegation against the employee was unfounded, lacking in evidence and the transfer was without justification.

(8) As to the applicant's withdrawal of the allowance of its 'chief regulator', the court held that since the employee had already been appointed chief regulator, he had acquired a right to that post and whatever benefit that had been enjoyed by him cannot be taken away. His removal clearly amounted to a deprivation of such benefit and the court did not disagree with the Industrial Court's finding that his removal as chief regulator was unjustified.

(9) Certiorari, being a discretionary remedy, the court, in granting or refusing an application for certiorari is entitled to consider not only the conduct of the applicant but also the circumstances of the case. In this case, the applicant's conduct leaves much to be desired. It showed a total disregard of the orders of the Industrial Court and of this High Court.

(10) The Industrial Court, in making its award, had not acted without or in excess of its jurisdiction, and consequently the application for an order of certiorari is dismissed.

Cases referred to

1 *Mak Sik Kwong* v *Minister of Home Affairs* [1975] 2 MLJ 175 (folld)
2 *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees' Union & Ors* [1980] 2 MLJ 165 (folld)
3 *Inchcape Malaysia Holdings Bhd* v *RB Gray & Anor* [1985] 2 MLJ 297 (folld)
4 *Sabah Banking Employees' Union* v *Sabah Commercial Banks' Union* [1989] 2 MLJ 284 (folld)
5 *Malayan Banking Bhd* v *Association of Bank Officers, Peninsular Malaysia & Anor* [1988] 3 MLJ 204 (refd)
6 *Ashbridge Investments* v *Minister of Housing & Local Government* [1965] 1 WLR 1320 (refd)
7 *A-G* v *Ryan* [1980] 2 WLR 143 (refd)
8 *Tanjong Jaga Sdn Bhd* v *Minister of Labour & Manpower & Anor* [1987] 1 MLJ 124 (refd)
9 *Malayan Commercial Banks Association* v *National Union of Bank Employees* [1981] 2 MLJ 183 (refd)
10 *Kuala Lumpur Hilton* v *National Union of Hotel, Bar & Restaurant Workers* [1989] 1 MLJ 42 (refd)
11 *Lian Yit Engineering Works Sdn Bhd* v *Loh Ah Fon* [1974] 2 MLJ 41 (refd)
12 *Oversea-Chinese Banking Corp* v *National Union of Bank Employees & Ors* [1985] 1 MLJ 439 (refd)
13 *Terengganu Bus Co Sdn Bhd* v *Transport Workers Union* [1983] 1 MLJ 393 (folld)

Legislation referred to

Employment Act 1955 s 14(2)
Industrial Relations Act 1967 ss 13(3)(b), 33A, 33B(1), 36(2), 43, 45(1), (2), 56, schedule item 11
Trade Unions Act 1959 s 40
Rules of the High Court 1980, O 53 r 1(2)

TM Varughese for the applicant.
B Lobo for the respondent.

Cur Adv Vult

Idris Yusoff J: This is an application by the applicant for an order of certiorari to quash Award No 138/88 handed down by the Industrial Court on 2 June 1988 pursuant to a reference made under s 36(2) of the Industrial Relations Act 1967. The said reference arose out of the dispute between the applicant and the respondent over the dismissal, transfer and demotion of some of the employees of the applicant whose particulars are set out in sch A, B and C annexed to the award.

It is not in dispute that the applicant is the only transport company in the state of Kelantan and is thus classified as an essential service under item 11 of the schedule to the Industrial Relations Act 1967.

The facts as disclosed by various affidavits are that on 27 August 1986 the applicant suspended an express bus driver Abdul Hamid bin Wok (claimant No 1 in sch A) pending investigations under s 14(2) of the Employment Act 1955 for an alleged misconduct in that he had physically opposed his superior at about 2.15pm on same day. At the material time, Abdul Hamid was the respondent's union section vice-chairman. Consequent upon the said suspension, 17 drivers referred to in sch A are alleged to have individually and collectively refused to drive the express buses and to perform the normal duties on 28 and 29 August 1986, as a result a number of buses were delayed, while two express buses with passengers had to be cancelled on the night of 28 August.

It is also alleged that prior to 28 August all buses were running as scheduled. No notice whatsoever was given by the drivers of the intended stoppage of work and no complaints of lack of equipment on the buses were ever lodged. Consequent upon the said stoppage, the 17 drivers (claimants No 2 and 4 to 19 in sch A) were suspended and were accordingly charged for misconduct. Domestic inquiries were conducted whereupon they were all found guilty and accordingly dismissed from service, so were Abdul Hamid bin Wok and Abdul Rahim bin Ahmad (claimant No 3) after the allegations against them were found proved at the said domestic inquiries. Apart from these 19 employees, four others as per Nos 20, 21 and 22 in sch B and No 23 in sch C were also found guilty and three of them were transferred to other stations while one of them was demoted.

It is common ground as indeed the law is settled that inspite of the ouster clause in s 33B(1) of the Industrial Relations Act 1967, certiorari is still available to quash the decision of the Industrial Court after it is found that the Industrial Court has acted without or in excess of the limit of its jurisdiction or if the court has jurisdiction to enter an inquiry it has done or failed to do something in the course of inquiry which is of such a nature that its decision is a nullity. The decision may be a nullity by reason of a breach or failure to observe the requirements of natural justice — see *Mak Sik Kwong* v *Minister of Home Affairs*,[1] *South East Asia Fire Bricks Sdn Bhd* v *Non-Metallic Mineral Products Manufacturers Employees Union and Ors*,[2] *Inchcape Malaysia Holdings Bhd* v *RB Gray & Anor*[3] and *Sabah Banking Employees' Union* v *Sabah Commercial Banks' Union*.[4] To ascertain whether the Industrial Court had or had not exceeded its jurisdiction, it must be asked whether the court in making its award had taken into account matters which it was required to do and/or had based its award on some matters which under the Act it had no right to take into account.

Mr Varughese, for the applicant, referred to the case of *Malayan Banking Bhd* v *Association of Bank Officers, Peninsular Malaysia & Anor*,[5] wherein the Supreme Court said:

> There are then some cases which assert that a jurisdictional error is committed if a decision-maker acts upon an incorrect basis in fact. The leading case is *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014, in which Lord Wilberforce said (at p 1047) that an official exercising a discretionary power commits a jurisdictional error if he or she acts 'upon an incorrect basis of fact'. ... Lord Denning MR has also suggested some widening of the scope of review of the exercise of discretion for factual error ... 'the courts can examine the exercise of (discretionary) powers to see that they are used properly, and not improperly or mistakenly. By 'mistakenly' I mean under the influence of a misdirection in fact or in law.'

The Supreme Court also held that the Industrial Court had committed a jurisdictional error if its decision was clearly perverse and was so devoid of plausible justification that no reasonable body of persons could have reached it. It also cited with approval the case of *Ashbridge Investments* v *Minister of Housing and Local Government*[6] in which Lord Denning said:

> The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; ...

On the other hand Mr Lobo, counsel for the respondent, submitted that unless there are jurisdictional defects in the award, the 'ouster' clause in s 33B of the Industrial Relations Act 1967 precludes the High Court from reviewing such award and the term 'review' in the context of an ouster clause has been set out in the Privy Council case of *A-G* v *Ryan*.[7] In that case Lord Diplock said at p 152:

> ... In 'review' the function of the superior judicial authority is limited to re-examining the inferior tribunal's conclusions of law as to the legal consequences of the facts as they have been found by the inferior tribunal ...

Furthermore in the exercise of its jurisdiction to review the award, the High Court should not be concerned with the decision but by the decision-making process as expounded in *Tanjong Jaga Sdn Bhd* v *Minister of Labour and*

Manpower & Anor[8] where Abdoolcader SCJ in delivering the judgment of the Supreme Court said at p 127:

> It is of considerable significance to have in mind that judicial review is of the hearing and not of the decision. The House of Lords firmly restated this principle in *Chief Constable of the North Wales Police* v *Evans* [1982] 1 WLR 1155 in holding that judicial review is concerned not with the decision but with the decision-making process, and that unless the restriction on the power of the court is observed the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

It was also submitted by Mr Lobo that in the light of s 33B of the Industrial Relations Act 1967 in any Industrial Court award, there is no review for errors of law on the face of the record— see *Malayan Commercial Banks Association* v *National Union of Bank Employees*;[9] neither is there one for errors in findings of fact — see *Kuala Lumpur Hilton* v *National Union of Hotel, Bar and Restaurant Workers*.[10] In the circumstances Mr Lobo went on to urge the court in the exercise of its discretion not to grant the orders applied for unless the applicant could overcome all the 'obstacles' set out above, which in the instant case the applicant could not.

It is also gathered from the respondent's affidavit dated 17 October 1988 that a different division of Industrial Court had refused to refer to the High Court under s 33A of the Industrial Relations Act 1967 for determination of questions of law which questions are almost or substantially identical with the grounds raised by the applicant before this court.

The several grounds upon which the applicant relies to support the reliefs sought are as follows.

Ground (a)

> The Industrial Court erred in law and acted without or in excess of its jurisdiction in failing to hold that the 16 claimants' (No 4-No 19 in sch 'A' of the award) concerted refusal and/or reduction in the performance of their normal work on 28 and/or 29 August 1986 constituted or deemed to be an illegal strike under s 45(1) of the Industrial Relations Act 1967 having regard to the fact that the employer company is an essential service within the scope of the Act and on the admission of the union (agreed facts) that it did not comply with the requirements to go on strike as provided for in the Industrial Relations Act 1967, Trade Unions Act 1959 and the union's own constitution.

It is contended by the applicant that judging from the conduct of the 16 claimants, viz their concerted refusal to perform their normal duties such conduct could be considered as a strike and since it is conceded that the respondent did not comply with the statutory requirements provided for under s 43 of the Industrial Relations Act 1967, s 40 of the Trade Unions Act 1959 and the respondent's own constitution, such strike is deemed to be an illegal one and relying on the case of *Lian Yit Engineering Works Sdn Bhd* v *Loh Ah Fon*[11] their dismissal is proper.

'Strike' as defined in the Industrial Relations Act 1967 means:

> the cessation of work by a body of workmen acting in combination, or a concerted refusal or a refusal under a common understanding of a number of workmen to continue to work or to accept employment, and includes any act or omission by a body of workmen acting in combination or under a common understanding, which is intended to or does result in any limitation, restriction, reduction or cessation of or dilatoriness in the performance or execution of the whole or any part of the duties connected with their employment.

This point was canvassed by the applicant before the Industrial Court but the said court failed and/or refused to consider this point when it handed down its award. It is contended that the failure and/or refusal to consider this point constitutes an excess of jurisdiction as envisaged in *Anisminic*'s case.

It is, however, argued by the respondent that the acts of the said claimants did not constitute strike as they merely refused to obey an unlawful order, since they were asked to drive buses which were not equipped with the safety equipment as required under the Road Traffic Ordinance 1958 and its subsidiary legislations. The respondent also took up a point that the said claimants were illegally locked out by the applicant and hence their refusal to drive those buses, if it constituted a strike, would in the circumstances be deemed to be a legal strike under s 45(2) of the Industrial Relations Act 1967.

It would appear that the Industrial Court was not caught up in this argument but instead made findings of fact and gave remedies as it thought fit under s 30(6) of the Industrial Relations Act 1967.

It would also appear from the award of the Industrial Court that the parties have agreed:

1) there were insufficient equipment in their respective buses (other than the items referred to in Co-3, ie driver's bag);
2) that the refusal of the 16 claimants to drive the express buses was as a result of such insufficient or lack of equipment.

However it is noted that the applicant disputes with the above agreed facts as it is contended that they are a complete distortion from the truth as the facts should read 'the refusal of workers on 28 and/or 29 August 1986 to drive the buses which did not have sufficient equipment was arising from suspension of claimant No 1 on 27 August 1986.' For myself I have to take cognizance of what was recorded by the Industrial Court as against the general statement in the applicant's submission and the statement filed pursuant to O 53 r 1(2) Rules of the High Court 1980. Moreover when an application under s 33A of Industrial Relations Act 1967 for reference to the High Court was made, such complaint was not brought out. This can be inferred from the language of Award No 235/1988.

As claimed by the applicant there was a concerted refusal and/or reduction of performance of the normal work on 28 and/or 29 August 1986. The question is whether the concerted refusal was in the circumstances justified. The Industrial Court accepted the admission of Mohd Azam bin Omar, a witness for the applicant, that the claimants had refused to drive the buses because the buses were not fully equipped. To my mind, having regard to the circumstances of the case, the alleged concerted refusal by the claimants was a mode of bringing to the attention of the applicant that certain provisions of the law affecting those buses have not been complied with and I must confess that I cannot imagine of a situation where an employee would be hauled up and dismissed just because he refused to obey an order which was unlawful. An order to drive a bus which contravenes certain road traffic laws and the refusal to obey such order cannot by any stretch of imagination be said to be a breach of the contract of employment since compliance with the said order would be an unlawful act and conduct of the claimants would not in law amount to an illegal strike. That the Industrial Court did not make any finding relating to the question of strike may perhaps be attributable to the fact that the dismissal of those claimants was due to their alleged violation of the applicant's disciplinary rule and not due to their alleged participation in an illegal strike!

Grounds (b) and (c)

> (b) The Industrial Court erred in law and acted without or in excess of its jurisdiction in holding on p 10 of the award that the refusal to perform their duties by the claimants (No 4 to No 19 in sch 'A') because of insufficiency of equipment was a reasonable refusal under the circumstances.
>
> (c) The Industrial Court erred in law and acted without or in excess of its jurisdiction to come to the conclusion on p 10 of the award that the dismissals of the 16 claimants have been without just cause or excuse in that the said conclusion is completely perverse and manifestly unreasonable that no reasonable body of persons could have reached them.

It is contended by the applicant that the finding of the Industrial Court that 'their refusal to perform their duties because of insufficiency of equipment was a reasonable refusal under the circumstances' is manifestly unreasonable and perverse that no reasonable body of persons would reach such a finding upon the facts and evidence adduced.

The charge against the 16 claimants was that they have violated the applicant's disciplinary rules by disobeying their superiors' instructions to perform their respective duties on 28 and 29 August 1986 resulting in the cancellation or disruption of the express buses services. Apart from the agreed facts and the admission of Encik Mohd Azam bin Omar referred to earlier, it would appear that the Industrial Court accepted the contention of the claimants that the buses were not fully equipped and that had the buses been fully equipped the claimants would have performed their duties. It is also borne out by the further evidence of Encik Mohd Azam that 'on those two days the management was busy trying to get replacement drivers for the express buses and did not make any attempt to have the buses sufficiently equipped'. The Industrial Court also referred to ss 5(1), 119(i) and 138(3) of the Road Traffic Ordinance 1958 and to Motor Vehicles (Construction and Use) Rules 1959 which rule requires equipment such as fire extinguisher, first-aid equipment, lifting jack and safety triangle be carried in or upon every public service vehicle and in the event of non-compliance with the above statutory provisions, the driver commits an offence and becomes liable to penalty under the Road Traffic Ordinance 1958. Reference was also made to a textbook on *Misconduct in Employment* by BR Ghaiye whereupon at p 134 para 15 it says:

> When a statutory provision throws any liability on an employee as to the mode in which he has to conduct himself then the employee must abide by such statutory provision and if he does not do so he is guilty of misconduct.

And at p 303 para 18 it says:

> It is well recognized that the disobedience of an unlawful order is not misconduct. The liability of employees is limited to obey only lawful orders of the employer.

In the event the Industrial Court felt that the question as to whether the 16 claimants were influenced by their leaders, namely, claimant No 1 and No 2, did not at all arise.

The finding of the Industrial Court was arrived at after a consideration of the evidence presented in the court. On the basis of such finding of fact can it be said that the act of disobedience by the 16 claimants justify dismissal? I think such act of disobedience can only justify dismissal if it is of a nature which goes to show that the claimants are repudiating their contracts of service or one of its essential conditions, and for that reason I think such disobedience must at least have the character of being wilful. In other words the disobedience connotes a deliberate flouting of the essential contractual conditions which element is lacking in the instant case. I therefore hold that the Industrial Court is not in error in coming to the conclusion as it did.

No doubt that under art 33.2 of the collective agreement there is stated that court fines and compounding fees relating to road traffic offences which are not caused by negligence or failure of employees shall be borne and paid by the applicant, but one must not lose sight of the fact that upon conviction of such offences it would add on points in the Road Transport Department demerit system against the said employees. Quite apart from that it ought to be realized that such agreement should not be construed as a licence to commit those offences.

Ground (d)

The Industrial Court erred in law and acted without or in excess of its jurisdiction by misconstruing the charge against claimant No 3 on pp 5 and 6 and coming to the finding in para 3 on p 7 of the award that 'We find that there is no evidence of any obstruction, incitement or threat imposed on the workers by claimant No 3', and in holding that the claimant's dismissal amounted to victimization.

Claimant No 3, Abdul Rahim bin Ahmad, the assistant station master, Pasir Puteh was charged for violating the applicant's disciplinary rules by directly involving himself in the planning and carrying out of activities of obstructing, inciting and threatening the workers from carrying out their normal duties resulting in the disruption of express and domestic bus services on 28 and 29 August 1986. The contention of the applicant is that the Industrial Court in coming to its finding completely chose to ignore the written statement which outlined his activities on the two days but instead preferred his evidence before the Industrial Court which materially contradicted his statement. The applicant felt that had the court given some consideration to the said statement it would not have come to that conclusion. The fact that the claimant was transferred pending investigations of his alleged misconduct does not constitute punishment and for the Industrial Court to conclude that the said transfer amounted to victimization is baseless and without factual substratum.

From the record, the Industrial Court heard the evidence of one Ibrahim bin Awang, a stage bus driver, who was produced on behalf of the applicant and also the evidence of the claimant himself. The gist of their evidence is set out on pp 21 and 22 of the record.

The personnel manager of the applicant company, Wan Abdul Razak, also gave evidence on behalf of the applicant. However, when asked by the court as to what was meant by 'obstructing, inciting, and threatening', his explanation was that the said claimant 'had sent the buses to the workshop for minor defects which was unusual'. The applicant also claimed that the claimant being off duty should not be at or around the bus station directing buses to the workshop or holding back the express bus.

On the other hand, the Industrial Court found that there was no evidence of any obstruction, incitement or threat imposed on the workers by the said claimant. He was 'there (at the bus station) to help his wife in her canteen business'. The court also came to the conclusion that claimant No 3 being an assistant station master and mindful of his responsibilities only attended to the needs of the drivers and furthermore there was no evidence to challenge the reason given by him for being at the place where he was.

For my part I find it difficult to interfere with the findings of the Industrial Court since the court had the total view of the proceedings, heard all the witnesses and even had before it the full statement recorded from the said claimant.

As claimed by the applicant the transfer of a personnel or an employee who is under investigation is not a punishment as was held by Harun J (as he then was) in *Oversea-Chinese Banking Corp* v *National Union of Bank Employees & Ors.*[12] On the facts as appeared in that case the court held that the transfer was 'an interim measure to facilitate investigations', apart from the fact that the employer had the 'right to transfer its staff within departments in the same office at any time at its sole discretion' as was clearly provided for under art 16(1) of Award 117/82.

In the instant case the transfer of the said claimant cannot be equated with the transfer referred to in *Oversea-Chinese Banking Corp*'s case,[12] as the claimant was transferred, according to Wan Abdul Razak, because he was 'implicated on 28 and 29 August 1986' and not for the purpose of facilitating the investigations. It was on this score the Industrial Court held that the dismissal of the claimant for the same reason was a clear case of victimization. Nevertheless, even assuming that the Industrial Court was wrong in holding that dual punishments have been meted out, to my mind, it would hardly make any difference to the finding of the court since the dispute relates to the dismissal which dismissal was held to be without just cause or excuse. The award was in regard to reinstatement and did not touch on the question of transfer. Hence the applicant also fails on this point.

Ground (e)

The Industrial Court erred in law and acted without or in excess of its jurisdiction to come to the conclusion on p 10 of the award that the dismissal of claimant Nos 4 and 13, included in the 16 claimants, were without just cause or excuse and consequently ordering reinstatement.

The dismissals of claimant Nos 4 and 13 were generally considered and discussed with the other 14 claimants under grounds (b) and (c).

Ground (f)

As regards claimant Nos 20 (Lah bin Harun) and 23 (Adnan bin Hj Abdullah), the Industrial Court erred in law and acted in excess of its jurisdiction by interfering with the management prerogatives and by ordering the company to pay them arrears of allowances which were due and payable only when they were required to perform additional tasks as provided for in their collective agreement but they ceased to perform any such additional task since September 1986.

Lah bin Harun, claimant No 20, who was appointed inspector in the applicant company, was asked to perform the function of 'regulator'. He was then paid an allowance of $100 per month over and above his substantive pay as provided for in para 3.1.5 of the collective agreement.

From September 1986 he was no longer paid the allowance of $100 by the applicant after he was asked to cease performing the additional function of regulator. The applicant claims that the withdrawal of the allowance was in accordance with the collective agreement and the terms of employment. It also claims that the transfer of an employee without reduction of salary is a management prerogative which the Industrial Court has no right to interfere.

In making the award the Industrial Court referred to the evidence of the general manager, Abdul Aziz bin Waley Mohamed who said the company had found out in January 1986 that the claimant had committed certain misconduct. He was alleged to have requested someone to punch his card and after being advised against it still repeated the same misconduct. However instead of bringing him before the board of inquiry the claimant was just transferred to Kubang Kerian office and was reverted to his substantive post. It was also admitted by Encik Abdul Aziz that the transfer was a punitive one.

In coming to that conclusion the Industrial Court was aware that s 13(3)(b) of the Industrial Relations Act 1967 gives the employer a right to transfer an employee provided it does not entail any change detrimental to the employee in regard to his terms of appointment and such prohibition is again stressed in art 2.1 of the collective agreement.

Be that as it may, the Industrial Court found as a fact that the transfer of claimant to Kubang Kerian was brought about following his attendance at the meeting on 28 August 1986. His transfer to his substantive post resulted in a loss of an allowance of $100. Furthermore, the Industrial Court felt that if there was any allegation of misconduct, the claimant was not given an opportunity to clear his name. Neither the employee who was alleged to have punched the card for the claimant nor the District Superintendent was produced in court. In the result the court held that the applicant had failed to establish the alleged misconduct. The term 'misconduct' to my mind refers to conduct so seriously in breach of the accepted practice that by standards of fairness and justice the employer should not be bound to continue the employment. As found by the Industrial Court the allegation against the claimant was unfounded, the evidence of misconduct was lacking and his transfer was therefore without justification. I do not feel disposed to interfere with such finding as I consider that the Industrial Court did not err either in fact or in law in coming to that finding.

As regards claimant No 23, Adnan bin Hj Abdullah, he was formerly appointed inspector. However, when being asked to perform the duties of 'chief regulator' he was paid in addition to his substantive pay a monthly allowance of $200. It is argued by the applicant that under the collective agreement the post of 'chief regulator' does not exist. It is therefore only a 'function to perform and not a designation' and consequently the allowance can be withdrawn at any time if the claimant is no longer required to carry out the additional duties. It is also contended by the applicant that it has every right to appoint a District Superintendent as head of Machang station as and when considered necessary and such appointment ought not to have been made a basis for drawing adverse inference against it.

It is noted from the circular letter dated 10 May 1982 the general manager informed all regulators of the claimant's appointment as chief regulator effective 1 May 1982 (exh U-22). This appointment was also made known to the claimant himself by the general manager in his letter dated 19 May 1982 (exh U-23) which letter also included payment of monthly allowance of $200. However by letter dated 21 September 1986 (exh U-24) the claimant was informed that the post of chief regulator was abolished and that he was to be reverted to his substantive post of regulator at Machang station. The monthly allowance of $200 was withdrawn from September 1986 but one significant factor seemed to attract the attention of the Industrial Court that upon the claimant's reversion to his substantive post the District Superintendent who was in Machang since 1985 was asked to take over the duties of the chief regulator.

It appears not to be in dispute that by virtue of art 28 of the Collective Agreement the applicant shall continue to extend and adopt whatever benefits and conditions of service heretofore conferred on and applicable to the employees though not covered by the agreement. Since the claimant had already been appointed chief regulator, it seems that he has acquired a right to that post and to my mind whatever benefit that had been enjoyed by him cannot be taken away and his removal clearly amounted to a deprivation of such benefit and consequently as found by the Industrial Court the claimant's removal as chief regulator was unjustified. I must say that I cannot disagree with such finding.

As submitted by the respondent, certiorari being a discretionary remedy 'the court in granting or refusing an application for certiorari is perfectly entitled to consider not only the conduct of the applicant but also the circumstances of the case' as was stated by Hashim Yeop A Sani J (as he then was) in *Terengganu Bus Sdn Bhd* v *Transport Workers Union*.[13] The respondent claims that the applicant has not only exhibited a complete disregard for the law, ie the Road Traffic Act but also the orders made by the Industrial Court as well as this court. Its conduct prompted the respondent to lodge a complaint with the Industrial Court under the provisions of s 56 of the Industrial Relations Act 1967 which complaint was heard on 6 October 1988 and the award (Award No 266/88) was handed down on 10 October 1988. According to the said

award the applicant was given five weeks from the receipt of the award to reinstate claimant Nos 3 to 19 failing which the office bearers of the applicant should be made to feel the punitive measures contained in s 56(3) of the Act. In addition the respondent was also advised to consider initiating proceedings for contempt against the officers of the applicant.

Going through the whole proceedings I feel that the conduct of the applicant leaves much to be desired. It has shown a total disregard for the orders of the Industrial Court as well as of this High Court. Such conduct should be deprecated and does not at all deserve to come to this court for assistance.

Finally I would say that the interesting and helpful arguments in this case have covered a very wide area and have involved an abundant citation of authorities. But essentially most of the grounds of the complaint touch upon findings of fact which are within the competence of the Industrial Court. On going through the award, I am satisfied that the Industrial Court in making such award had not acted without or in excess of its jurisdiction and consequently the application for an order of certiorari is dismissed with costs.

Order accordingly.

Solicitors: *TM Varughese & Co; Lobo & Associates.*

Reported by *Zarinah Marican*

Development & Commercial Bank Bhd v Che Wan Development Sdn Bhd & Ors

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 31-182-88
ABDUL MALEK J
28 AUGUST 1989

Banking — Charges — Enforceability of — Interest payable as of right — Conclusiveness of balance due as provided in agreement — Stamp duty on charge — Civil Law Act 1956, s 11 — National Land Code 1965, s 294 — Stamp Ordinance 1949, s 14

Civil Procedure — Leave to intervene — Stay of execution — Whether appellants would be irremediably injured and appeal rendered nugatory — Circumstances of the parties

Land Law — Registered prior charge — Indefeasibility of prior registration — National Land Code 1965, ss 294 & 340

The defendants were registered proprietors of particular pieces of land and had executed three separate charges over the said pieces of land in favour of the plaintiff as consideration and security for banking facilities of $3.5m granted to the first defendant by the plaintiff. The charges were registered in May 1983, February 1988 and April 1988. The defendants committed a breach of the terms of the charges and the plaintiff brought proceedings for the sale of the said pieces of land.

There was also an application by a third party to intervene in the matter. She alleged that she bought the piece of land charged by the third and fourth defendants on 29 September 1987 and had built a house on it, thereby enhancing the value of the property to the benefit of the plaintiff. As the third defendant had failed to appear and an order had been made against him, she applied for leave to intervene.

The first, second and fourth defendants contended that (1) the charges were unenforceable as the principal sums and rate of interest had not been itemized; (2) the interest rate should be categorized into three stages and s 11 of the Civil Law Act 1956 applied to one category only and it disallowed compound interest; and (3) the stamp duty was underpaid and the documents should be impounded.

Held, granting the plaintiff's application but ordering a stay of execution pending appeal:

(1) Clause 1 of the three charges states that the statement of the manager or any other officer of the chargee as to the amount of balance due shall be final and conclusive. The parties are bound to accept the statement of conclusive evidence of the debt due.

(2) Section 11 of the Civil Law Act 1956 does not apply to debts where interest is payable as of right whether by virtue of an agreement or otherwise, as in the present case.

(3) Section 14 of the Stamp Ordinance 1949 provides that when interest is expressly made payable by the terms of an instrument, such instrument shall not be chargeable with duty higher than that with which it would have been chargeable if no mention of interest had been made therein. Further, once documents have been passed by the registering authority as fit for registration, it cannot at a late stage be impeached on the ground that they were not sufficiently stamped at the time of registration.